

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/04-02/06
Date: 12 December 2014

TRIAL CHAMBER VI

**Before: Judge Robert Fremr, Presiding Judge
Judge Kuniko Ozaki
Judge Geoffrey Henderson**

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. BOSCO NTAGANDA***

**Public
With Public Annex A**

**Decision on adoption of a 'Protocol on the Handling of Confidential Information
During Investigations and Contact Between a Party or Participant and Witnesses
of the Opposing Party or a Participant'**

Decision to be notified, in accordance with Regulation 31 of the Regulations of the Court, to:

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Ms Nicole Samson

Counsel for Bosco Ntaganda

Mr Stéphane Bourgon
Mr Luc Boutin

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verill

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber VI ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Articles 43(6), 54(1)(b) and (3)(f), 67(1) and 68(1) of the Rome Statute ('Statute'), Rules 17, 18 and 87 of the Rules of Procedure and Evidence ('Rules'), Regulations 92 to 96 of the Regulations of the Registry, Articles 4, 8(4) and 29 of the Code of Professional Conduct for counsel, and Articles 66 to 68 of the Code of Conduct for the Office of the Prosecutor, issues the following 'Decision on adoption of a "Protocol on the Handling of Confidential Information During Investigations and Contact Between a Party or Participant and Witnesses of the Opposing Party or a Participant"'.

I. Procedural history

1. On 11 September 2014, the Chamber held its first status conference, during which the parties stated that a Protocol on the Handling of Confidential Information and on Contacts with Witnesses of the Opposing Party had been agreed on at the confirmation stage and indicated their intention to complete their ongoing discussions on its amendment soon.¹
2. On 17 October 2014, the parties orally updated the Chamber on the progress made and proposed a timeline for the submission of a protocol, which was accepted by the Chamber.² Further, the Chamber instructed the parties to use the protocols adopted in the '*Kenya cases*' as a 'starting point' for negotiations.³
3. On 31 October 2014, the Office of the Prosecutor ('Prosecution') filed a draft protocol ('Proposed Protocol') indicating four areas still in dispute with the defence team for Mr Ntaganda ('Defence') and for which a ruling of the

¹ Transcript of Hearing dated 11 September 2014, ICC-01/04-02/06-T-13-ENG ET, page 25, line 8 to page 26, line 1.

² Transcript of Hearing dated 17 October 2014, ICC-01/04-02/06-T-15-ENG ET, page 12, line 18 to page 15, line 15.

³ ICC-01/04-02/06-T-15-ENG ET, page 16, lines 8-19.

Chamber is required.⁴ These four draft provisions pertain to: i) a requirement to apply to the Chamber in order to use photographs depicting witnesses ('First Issue'); ii) a restriction on sharing inadvertently disclosed material with Mr Ntaganda ('the Accused') ('Second Issue'); iii) the need to inform the Victims and Witnesses Unit ('VWU') when, in the course of an investigation, it is necessary to disclose the identity of a witness in the Court's protection program ('ICCP') or who has otherwise been relocated with the assistance of the Court ('Third Issue'); and iv) the appropriate measures when investigating witnesses of the opposing party who allege that they suffered sexual violence, where it is apparent that the witness has not revealed the sexual violence to his or her family ('Fourth Issue').

4. On 10 November 2014, the Legal Representatives of Victims submitted joint observations on the Proposed Protocol, whereby they informed the Chamber that they had been involved extensively in the discussions. They indicated that they fully endorse the Prosecution's position and request that the Chamber adopts the Proposed Protocol.⁵
5. On that same date, after having been instructed to do so by the Chamber,⁶ the VWU filed its observations on the Proposed Protocol in the record of the case.⁷

⁴ Prosecution's Proposed Protocol on the Handling of Confidential Information During Investigations and Contact Between a Party and Witnesses of the Opposing Party, 31 October 2014, ICC-01/04-02/06-392.

⁵ Common Legal Representatives' joint observations on the "Public Redacted Version of Prosecution's Proposed Protocol on Redactions" and on the "Prosecution's Proposed Protocol on the Handling of Confidential Information During Investigations and Contact Between a Party and Witnesses of the Opposing Party" dated 31 October 2014, 10 November 2014, ICC-01/04-02/06-397.

⁶ Email from Legal Officer of the Chamber to VWU, copying for their information the parties and participants, 6 November 2014, 12:56.

⁷ Victims and Witnesses Unit's Observations on the Prosecution's Proposed Protocol on Redactions and on the Prosecution's Proposed Protocol on the Handling of Confidential Information During Investigations and Contact Between a Party and Witnesses of the Opposing Party, 10 November 2014, ICC-01/04-02/06-398-Conf.

6. On 14 November 2014, the Defence submitted its response to the Proposed Protocol, requesting the Chamber to either deny the adoption of the contested provisions or modify them in accordance with its suggestion.⁸

II. Analysis

7. The Chamber stresses that it has given considerable weight to the parties' agreements. Where there is no disagreement, the Chamber has generally accepted the proposed procedure in the form presented in the Proposed Protocol, at times with minor modifications.
8. As regards issues on which agreement was not reached, the Chamber considered the parties' competing submissions. In doing so, it has carefully balanced the rights of the Accused pursuant to Articles 64(2) and 67 of the Statute and the protection of the safety, physical and psychological well-being, dignity and privacy of witnesses under Article 68(1) of the Statute.
9. The Chamber underscores that the protocol, as set out in Annex A ('Protocol'), also applies to contacts between a party and any victims who may eventually be authorised to testify.

A. First Issue - The requirement to apply to the Chamber in order to use photographs depicting witnesses

10. Paragraph 7 of the Proposed Protocol reads as follow :

Photographs depicting witnesses should be used only when no satisfactory alternative investigative avenue is available. In order to use such material, the investigating party should present a request to the Chamber. To reduce the risk of disclosing the involvement in the activities of the Court of the persons depicted, the parties and participants shall only show photographs which do not contain elements which tend to reveal such involvement, and are in compliance with paragraph 20 of this Protocol. Unless otherwise authorised by the Chamber, members of the public

⁸ Response on Behalf of Mr Ntaganda to Prosecution's Proposed Protocol on the Handling of Confidential Information During Investigations and Contact Between a Party and Witnesses of the Opposing Party, 14 November 2014, ICC-01/04-02/06-400.

should not retain a hard copy of photographs depicting witnesses or other individuals involved with the Court.⁹

11. The parties disagree about the inclusion of the requirement to seek the leave of the Chamber before using a photograph depicting witnesses.
12. The Prosecution argues that before showing a photograph depicting a witness, the investigative party shall seek the leave of the Chamber. Citing the protocols used in the cases of *The Prosecutor v. Laurent Gbagbo* and of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, as well as the comments made by the VWU in the latter case, the Prosecution submits that this will reduce the risk of unnecessarily associating witnesses and their family members with the Court and the adverse psychological impact it could have on them.¹⁰ The VWU considers that requesting the leave of the Chamber adds an additional level of security and therefore supports the Prosecution's proposal.¹¹
13. The Defence opposes the inclusion of this requirement and submits that this would constitute a grave interference in its ability to investigate.¹² It argues, notably, that as the investigations are a spontaneous and unpredictable process, it is in practice not possible for the Defence, while in the field, to make such an application each time it wants to show a photograph depicting witnesses.¹³ The Defence stresses that it will exercise caution in using photographs, for instance by showing them together with other photographs to diminish the risk that the witness depicted be associated with the Court.¹⁴
14. The Chamber accepts the Defence's argument that investigations are unpredictable by nature, in particular in a context such as that of the Ituri

⁹ ICC-01/04-02/06-392-AnxA, para. 7 (footnotes omitted).

¹⁰ ICC-01/04-02/06-392, paras 13-19, in particular para. 19.

¹¹ ICC-01/04-02/06-398-Conf, para. 3.

¹² ICC-01/04-02/06-400, paras 12-14.

¹³ ICC-01/04-02/06-400, para. 15.

¹⁴ ICC-01/04-02/06-400, para. 16.

region, in which the security situation is volatile.¹⁵ The Chamber therefore considers that requiring a party to make an application each time it intends to show a photograph would impose an excessive burden, as it may prove impracticable while in the field and may lead to the *de facto* impossibility of using such photographs.¹⁶ Consequently, the Chamber considers that photographs shall be treated like any other visual and/or non-textual material and that their use does not require the leave of the Chamber.

15. However, the Chamber is mindful of its responsibility to protect the safety and well-being of witnesses pursuant to Article 68 of the Statute. It therefore stresses that the utmost caution shall be exercised when showing any kind of visual material depicting a witness. Such a method shall only be used when all other investigative avenues have been exhausted. Regarding in particular the use of photographs, the Chamber considers the suggestion of the Defence to be relevant, namely that if a party intends to use photographs, these should be shown together with other photographs of the same kind and in a manner which does not reveal the cooperation of the witness with the Court.

16. Accordingly, the Chamber considers that the current paragraph 7 of the Proposed Protocol shall be replaced by the following, as set out in Annex A.

Visual and/or non-textual material such as photographs depicting witnesses should be used only when no satisfactory alternative investigative avenue is available. To

¹⁵ Registry Report on the Security Situation in Democratic Republic of Congo, 10 November 2014, ICC-01/04-02/06-396-Anx 1, pages 5-6.

¹⁶ The Chamber notes that Trial Chambers III, IV and V have also decided that the leave of the Chamber shall not be required to show photographs depicting witnesses. *See*, Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Redacted Decision on the Prosecution's Request to Lift, Maintain an Apply to Witness Statements and Related Documents, 20 July 2010, ICC-01/05-01/08-813-Red, para. 87; Trial Chamber IV, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Decision on the Protocol on the handling of confidential information and contact of between a party and witnesses of the opposing party, 18 February 2013, ICC-02/05-03/08-451, para. 28. In the cases of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* and *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, the Prosecution proposed the inclusion of a similar requirement and the defence teams opposed (*See* respectively, ICC-01/09-01/11-437-Anx1, pages 12-14 and ICC-01/09-02/11-440-Anx1, pages 14-16). Trial Chamber V adopted a protocol in the form proposed by the Defence in respect of this matter (*See* respectively, ICC-01/09-01/11-449-Anx, para. 21 and ICC-01/09-02/11-469-Anx, para. 21).

reduce the risk of disclosing the involvement in the activities of the Court of the persons depicted or otherwise reflected, the parties and participants shall only use such visual and/or non-textual material which do not contain elements which tend to reveal such involvement, and are in compliance with [paragraph 21] of this Protocol. Additionally, when photographs depicting witnesses or victims are used, these shall only be shown together with other photographs of the same kind. Unless otherwise authorised by the Chamber, members of the public should not retain a hard copy of photographs depicting witnesses or other individuals involved with the Court.

B. Second Issue - The restriction on sharing inadvertently disclosed material with the Accused

17. Paragraph 11 of the Proposed Protocol reads as follow :

In the event that the receiving party or participant discovers that it has received material that it believes should not have been disclosed or should have been disclosed in redacted form, the receiving party or participant shall bring that fact immediately to the attention of the disclosing party or participant. Pending confirmation by the disclosing party or participant that the material should not have been disclosed or should have been disclosed in redacted form, the receiving party or participant shall act in good faith and refrain from sharing the material in any manner including with the accused.¹⁷

18. The parties disagree on the inclusion of the words 'including with the accused'.

19. The Prosecution seeks inclusion of this language. It argues that there would be no reason for the Defence to share material disclosed by mistake with the Accused unless it would be for the purpose of taking advantage of this error, potentially resulting in serious security risks for witnesses and victims.¹⁸ It considers that counsel have an ethical duty not to share inadvertently disclosed materials to 'any third party', which includes the Accused (who, while required to respect confidentiality, is not under the ethical and professional obligations binding upon counsel).¹⁹

20. The Defence disagrees with the Prosecution. It recalls that under their national codes, every attorney has a duty of loyalty with his/her client and

¹⁷ ICC-01/04-02/06-392-AnxA, para. 11 (footnote omitted).

¹⁸ ICC-01/04-02/06-392, para. 21.

¹⁹ ICC-01/04-02/06-392, para. 22.

thus to share with him/her any information relevant to the case.²¹ It submits that, in addition, for the purpose of the proceedings, the Accused and his counsel are to be regarded as one and the same. The Accused cannot be considered as a third party and the counsel simply represents him, acting as an intermediary between him and the Court.²² The Defence further argues that the proposed provision is impractical as the disclosed material will most probably already have been shared with the Accused by the time the Defence is informed of the fact that the material has been inadvertently disclosed.²³

21. The Chamber fully shares the view expressed by the Prosecution that inadvertently disclosed material requires specific measures, as it is understood that it should never have been disclosed in the first place. As inadvertently disclosed material may have a serious impact on the security of witnesses, the Chamber considers, in accordance with Article 68(1) of the Statute, that the team member of the receiving party noticing or being notified of the inadvertent nature of the information disclosed shall limit its dissemination including with the Accused and, to the extent possible, with other members of the team.

22. Additionally, with regard to the Defence's argument that under national codes of conduct, every attorney is bound to share with the accused any information relevant to the case, the Chamber notes that Article 4 of the Code of Professional Conduct for counsel clearly states that in case of '[i]nconsistency between this Code and any other code of ethics or professional responsibility which counsel are bound to honour', the former shall have primacy.

²¹ ICC-01/04-02/06-400, para. 21.

²² ICC-01/04-02/06-400, paras 24-27.

²³ ICC-01/04-02/06-400, paras 27-28.

23. Consequently, the Chamber considers that paragraph 11 of the Proposed Protocol shall be replaced by the following paragraph, as set out in Annex A:

In the event that the receiving party or participant discovers that it has received material that it believes should not have been disclosed or should have been disclosed in redacted form, the receiving party or participant shall bring that fact immediately upon discovery to the attention of the disclosing party or participant. Pending confirmation by the disclosing party or participant that the material should not have been disclosed or should have been disclosed in redacted form, the member of the team having received the said material shall act in good faith and refrain from sharing the material in any manner, including with the accused and, to the extent possible, with other members of the team.

C. Third Issue - The need to inform the VWU prior to the mission when, in the course of an investigation, it is necessary to disclose the identity of a witness in the ICCPP or who has otherwise been relocated with the assistance of the Court

24. Paragraph 21 of the Proposed Protocol reads as follow :

Should the investigating party or participant need to disclose the identity of a witness who is in the ICCPP or who has otherwise be (*sic*) relocated with the assistance of the Court during the course of specific investigations related to that witness, the investigating party or participant shall liaise with the Victims and Witnesses Unit ("VWU") prior to the mission in which such disclosure may take place and shall communicate the details of the place, time and, to the extent possible, the types of organisations, institutions and, if available, the persons that the party or participant intends to contact and to which it intends to disclose the identity of protected witness(es) and/or persons otherwise protected by the VWU. Additionally, the way disclosure will take place will be discussed with the VWU, which shall provide the investigating party or participant with its best practices and advice in relation to the specific information communicated by that party or participant.²³

25. The Prosecution argues that considering VWU's mandate to maintain a protection program for witnesses, it needs to be properly informed of development that may impact on the security of the witnesses, which is the purpose of this provision.²⁴ The VWU supports the Prosecution's position

²³ ICC-01/04-02/06-392-AnxA, para. 21 (footnote omitted).

²⁴ ICC-01/04-02/06-392, paras 30-31.

and argues that the provision shall apply to any person protected by the VWU.²⁶

26. The Defence considers that this provision hinders its ability to conduct investigations as it does not take into account their unpredictability. It underlines, that it is impossible to liaise with VWU prior to each time the name of an ICCPP witness will be mentioned.²⁷ It therefore requests its deletion from the Protocol.²⁸ Alternatively, the Defence observes that at the confirmation phase the Prosecution suggested the inclusion of a less constraining version of this paragraph, that instead of requiring liaison with the VWU prior to each mission, simply imposed on the Defence the obligation to inform the VWU of its intention to disclose the name of an ICCPP witness 'as soon as possible'. It notes that the Single Judge subsequently expanded the provision, making it more detailed. The Defence considers that the provision as originally proposed by the Prosecution would represent an acceptable compromise.²⁹

27. Regarding the argument of the Defence that such a provision shall not be included at all in the Protocol, the Chamber notes that the Defence advanced these same arguments at the confirmation and that they were rejected by the Pre-Trial Chamber.³⁰ This Chamber sees no reason to depart from the Pre-Trial Chamber's conclusions on this point. The Chamber recalls that pursuant to Article 68(1) of the Statute, it has the obligation to protect the safety, physical and psychological well-being, dignity and privacy of

²⁶ ICC-01/04-02/06-398-Conf, para. 5.

²⁷ ICC-01/04-02/06-400, paras 36-37.

²⁸ ICC-01/04-02/06-400, para. 41.

²⁹ ICC-01/04-02/06-400, paras 31, 39-40 and 42.

³⁰ Réponse de la Défense à la « *Prosecution's request to adopt a Protocol on the handling of confidential information and contacts with witnesses of the opposing party* » transmise à la Défense le 9 Décembre 2013, 12 December 2013, ICC-01/04-02/06-174, paras 17, 19 and 24. The Chamber notes that at the confirmation phase, the Defence made an additional argument that informing the VWU would compromise the confidentiality character of the Defence investigations. *See also*, Decision on the Protocol on the Handling of Confidential Information and Contact with Witnesses of the Opposing Party, 17 December 2013, ICC-01/04-02/06-185, para. 15, in which the Single Judge decides on a formulation rejecting the Defence's arguments.

witnesses. Therefore, endorsing the conclusion of the Pre-Trial Chamber, the Chamber finds it appropriate that the VWU be informed of the disclosure of the identity of an ICCPP witness or a witness who has been otherwise relocated with the assistance of the Court.

28. As to the Defence proposal to include the Prosecution's original suggestion, namely that VWU shall be informed as soon as possible (as opposed to prior to each mission) and that no details shall be given as to the conditions in which the interview will take place, the Chamber notes that the primary purpose of the provision is to enable the VWU to advise the party as to the best way to effectuate the disclosure. It is therefore necessary that the VWU be informed sufficiently in advance before the disclosure. Consequently, the Chamber considers it appropriate that the party informs the VWU *prior* to the mission.

29. As to the level of details that shall be communicated to the VWU, the Chamber notes that pursuant to paragraph 21 of the Proposed Protocol, the only information that the party has to communicate are the details of the place and time of the interview. Paragraph 21 of the Proposed Protocol requires the party to provide the VWU with further details, for instance the person(s) to which it intends to disclose the information, 'to the extent possible' and 'if available'. The Chamber considers that this phrasing provides the Defence with sufficient flexibility for the degree of unpredictability inherent in the course of investigations. Moreover, the obligation applies in respect of 'specific investigations related to that witness', and therefore the Chamber would anticipate that the parties should in most cases be able to anticipate the possibility of such disclosure at the time of planning field missions. Further it stresses that the requirement that the VWU must be informed of the place and time of the interview shall be

understood broadly and that it does not impose on the party an obligation to communicate the exact location and time of the interview.

30. As to the scope of the provision, the Chamber notes that the parties agreed that it shall only apply to witnesses in the ICCPP or who have otherwise been relocated with the assistance of the Court.³⁰ However, the Chamber considers that the VWU, as the entity of the Court in charge of the protection of witnesses, shall be informed that the identity of any protected witnesses has been disclosed, as such a disclosure may indeed change the risk profile of the individual. Hence, if a party intends to disclose or has disclosed the identity of a witness who is not in the ICCPP or who has not been relocated with the assistance of the Court, but who is protected in any other manner, it shall inform the VWU that such disclosure will occur or has occurred, as soon as possible.

31. Consequently, the Chamber considers that the provision shall be retained in the Protocol with the following modifications:

Should the investigating party or participant need to disclose the identity of a witness who is in the ICCPP or who has otherwise been relocated with the assistance of the Court, during the course of specific investigations related to that witness, the investigating party or participant shall liaise with the VWU prior to the mission in which such disclosure may take place and shall communicate the details of the place, time and, to the extent possible, the person(s) that the party or participant intends to contact and to whom it intends to disclose the identity in question. Additionally, the way disclosure will take place will be discussed with the VWU, which shall provide the investigating party or participant with its best practices and advice in relation to the specific information communicated by that party or participant.

32. The following additional paragraph shall also be included :

Should the investigating party or participant need to disclose the identity of a witness who is otherwise protected by the VWU the investigating party or participant shall inform the VWU as soon as possible.

³⁰ ICC-01/04-02/06-392, para. 29; ICC-01/04-02/06-400, para. 33.

D. Fourth Issue - The appropriate measures when investigating witnesses of the opposing party who allege that they suffered sexual violence, where it is apparent that the witness has not revealed the sexual violence to his or her family

33. Paragraph 27 of the Proposed Protocol reads as follow :

Where a witness has stated that she or he has suffered sexual and/or gender based crimes and it is apparent that the witness has not discussed the violence with members of his or her family, the investigating party or participant must exercise real caution in investigating the allegations to protect the privacy, dignity and well-being of the witness. It shall not reveal this information to these family members or to persons who will communicate the information to family members and any inquiries it undertakes must be done so as to ensure the confidentiality of the information. Where there are no suitable alternative investigative avenues available, the investigating party or participant may communicate the information that the witness suffered sexual or gender based crimes to those individuals that the witness has stated she or he has informed or has confirmed are aware of the sexual and gender based crimes suffered, provided that in doing so the investigating party or participant does not reveal that she or he is a witness with the ICC.³²

34. The parties disagree on the scope of this paragraph.

35. The Prosecution submits that three witnesses in the case have suffered sexual violence and fear revealing it to their family and community.³³ It recalls that pursuant to Article 68(1) the Court shall take appropriate measure to protect the safety, well-being, dignity and privacy of witnesses, especially where the crime involves sexual violence.³⁴ It argues that, as opposed to the potentially devastating impact on the witnesses' psychological well-being and dignity, revealing this information to the family members would be of minimal gain for the investigating party as it already knows that the witness has not informed his or her family.³⁵ The Prosecution further submits that the additional clause it proposes, namely that the investigating party may communicate the information that the witness suffered sexual violence to those individuals that the witness has

³² ICC-01/04-02/06-392-AnxA, para. 27 (footnote omitted).

³³ ICC-01/04-02/06-392, para. 37.

³⁴ ICC-01/04-02/06-392, para. 38.

³⁵ ICC-01/04-02/06-392, para. 40.

stated are aware of it, will provide additional flexibility to the investigating party.³⁶ In its submissions, the VWU supports the Prosecution's proposal and suggests some minor additional modifications to the provision.³⁷

36. The Defence submits that the prohibition on revealing the information to family members or others who would communicate it to the family members constitutes a serious impediment to the Defence's ability to investigate, as it prevents investigation of the credibility and reliability of the witness. The Defence proposes restricting the scope of the prohibition only to 'immediate family members'. The Defence argues that this would achieve the aim of paragraph 27 without excessively impeding its investigations.³⁸

37. Preliminarily, the Chamber notes that, at the confirmation stage, the Defence opposed the inclusion of this paragraph.³⁹ In its submissions before the present Chamber it does not oppose its inclusion but, on the basis of the same arguments, proposes a new formulation.

38. As to the Defence's proposal, the Chamber notes that it mainly consists of restricting the prohibition made to the investigating party to communicate the information that the witness has suffered sexual violence to immediate family members. Consequently, the provision as phrased by the Defence, authorises the investigating party to reveal this information to others, including to persons who may communicate it to family members. The Chamber therefore considers that the formulation proposed by the Defence would defeat the purpose of the provision and render it meaningless.

³⁶ ICC-01/04-02/06-392, para. 36.

³⁷ ICC-01/04-02/06-398-Conf, para. 7.

³⁸ ICC-01/04-02/06-400, paras 51-53.

³⁹ Pre-Trial Chamber II, Decision on the Protocol on the Handling of Confidential Information and Contact with Witnesses of the Opposing Party, 17 December 2013, ICC-01/04-02/06-185, paras 16-21. *See also*, Pre-Trial Chamber II, Réponse de la Défense à la « Prosecution's request to adopt a Protocol on the handling of confidential information and contacts with witnesses of the opposing party » transmise à la Défense le 9 Décembre 2013, 12 December 2013, ICC-01/04-02/06-174.


39. Additionally, the Chamber wishes to emphasise that, as to whether such a provision should be included in the Protocol, it endorses the reasoning and conclusion of the Pre-Trial Chamber⁴⁰ and does consider that such a provision is necessary to protect the well-being and dignity of these vulnerable witnesses.

40. Consequently, the Chamber considers that paragraph 27 of the Proposed Protocol must be retained in the form proposed by the Prosecution, as set out in Annex A.

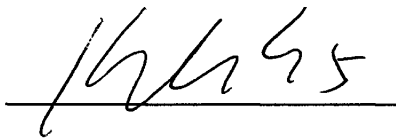
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

ADOPTS the Protocol, as set out in Annex A.

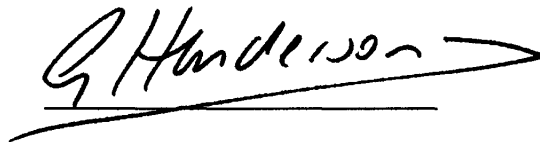
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Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki



Judge Geoffrey Henderson

Dated 12 December 2014

At The Hague, The Netherlands

⁴⁰ Pre-Trial Chamber II, Decision on the Protocol on the Handling of Confidential Information and Contact with Witnesses of the Opposing Party, 17 December 2013, ICC-01/04-02/06-185, paras 19-21.

ANNEX A

PUBLIC

**PROTOCOL ON THE HANDLING OF CONFIDENTIAL INFORMATION DURING
INVESTIGATIONS AND CONTACT BETWEEN A PARTY OR PARTICIPANT AND
WITNESSES OF THE OPPOSING PARTY OR OF A PARTICIPANT**

I. Introduction

1. The Protocol sets out the procedures governing the handling of confidential information during investigations, including the circumstances in which disclosure of the identity of a protected witness from the opposing party can be effectuated, as well as the conditions under which the investigating party or participant is authorised to contact witnesses of the opposing party or of a participant. The purpose of the Protocol is to protect the safety of witnesses, victims and other individuals at risk, as well as the integrity of investigations, in a manner consistent with the rights of the accused.
2. The parties and participants shall adhere to the high standards set out in, *inter alia*, the Code of Professional Conduct for counsel, the Code of Conduct for Investigators and the Code of Conduct of the Office of the Prosecutor.

II. Definitions

3. In this Protocol, the terms below shall have the following meaning:
 - a. 'party' shall mean the Prosecutor or Mr Ntaganda, as the case may be, and their respective teams, including counsel, resource persons, and investigators;
 - b. 'participant' shall mean the legal representatives of victims and their teams;
 - c. 'public' shall include all persons, governments, organisations, entities, associations and groups but shall not include a 'party' or 'participant' as defined above, a judge or legal officer of the International Criminal Court ('Court') or a member of the Registry of the Court;¹

¹ See Trial Chamber IV, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Protocol on the handling of confidential information and contact between a party and witnesses of the opposing party; 18 February 2013, ICC-02/05-03/09-451-Anx, para. 2.

- d. 'others at risk' are persons at risk on account of the activities of the Court;²
- e. 'confidential information' shall mean any information classified as such in accordance with Regulation 14(b) of the Regulations of the Registry or classified as 'ex parte', 'confidential' or 'under seal', only known to the parties and, if appropriate, participants, and not to be disclosed to the public;³
- f. 'witness' shall refer to a person whom a party or participant intends to call to testify or whose statement the party or participant intends to rely upon, provided that such intention has been conveyed to the non-calling party or participant by means that establish a clear intention on behalf of the calling party or participant to rely upon the individual as a witness.⁴

- 4. All obligations listed in the current protocol that apply to the parties and participants also apply to the intermediaries they use, any other individuals who perform tasks on their behalf and the suspects or accused.

III. Use of Confidential Information in the Course of the Investigations

- 5. The provision of confidential information between parties and participants and its subsequent use and disclosure is governed by the legal instruments of this Court, including without limitation the Rome Statute ('Statute') the Rules of Procedure and Evidence ('Rules') and the relevant jurisprudence of the Court.⁵
- 6. Every party or participant shall apply best practices throughout the investigation. An integral part of these best practices is to minimise the risk of exposing confidential information to the greatest extent possible.⁶

² See Trial Chamber V, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Protocol concerning the handling of confidential information and contacts of a party with witnesses whom the opposing party intends to call, 24 August 2012, ICC-01/09-01/11-449-Anx, para. 2; Trial Chamber V, *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Protocol concerning the handling of confidential information and contacts of a party with witnesses whom the opposing party intends to call, 24 August 2012, ICC-01/09-02/11-469-Anx, para. 2.

³ ICC-02/05-03/09-451-Anx, para. 2.

⁴ ICC-02/05-03/09-451-Anx, para. 2.

⁵ See ICC-02/05-03/09-451-Anx, para. 4.

⁶ ICC-02/05-03/09-451-Anx, para. 5; Pre-Trial Chamber III, *The Prosecutor v. Laurent Gbagbo*, Protocols concerning the disclosure of the identity of witnesses of the other party and the handling of confidential information in the course of investigations, 6 March 2012, ICC-02/11-01/11-49-Anx, page 1.

7. Confidential information disclosed to a party or participant by the opposing party or by a participant may only be disclosed to the public where such disclosure is directly and specifically necessary for the preparation and presentation of their case.⁷
8. When confidential information is made known to a member of the public by a party or participant, that party or participant will explain to such a person the confidential nature of the information and that such information shall not be reproduced or disclosed to anyone else in whole or in part.⁸ Unless otherwise authorised by the Chamber, members of the public should not retain a hard copy of the information.
9. Visual and/or non-textual material such as photographs depicting witnesses should be used only when no satisfactory alternative investigative avenue is available.⁹ To reduce the risk of disclosing the involvement in the activities of the Court of the persons depicted or otherwise reflected, the parties and participants shall only use such visual and/or non-textual material which do not contain elements which tend to reveal such involvement, and are in compliance with paragraph 21 of this Protocol.¹⁰ Additionally, when photographs depicting witnesses or victims are used, these shall only be shown together with other photographs of the same kind. Unless otherwise authorised by the Chamber, members of the public should not retain a hard copy of photographs depicting witnesses or other individuals involved with the Court.
10. The party or participant disclosing confidential information shall keep a record in any form of the circumstances in relation to such disclosure during their investigation and/or preparation of the case,¹¹ including: (i)

⁷ ICC-02/05-03/09-451-Anx, para. ('directly and specifically necessary'); ICC-02/11-01/11-49-Anx, page 3 ('necessary and inevitable'); Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the prosecution's application for an order governing disclosure of non-public information to members of the public and an order regulating contact with witnesses, 3 June 2008, ICC-01/04-01/06-1372, para. 12 ('truly necessary').

⁸ ICC-02/05-03/09-451-Anx, para. 7.

⁹ ICC-02/11-01/11-49-Anx, page 4; ICC-02/05-03/09-451-Anx, para. 8; Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Redacted decision on the Prosecution's requests to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents, ICC-01/05-01/08-813-Red, 20 July 2010, para. 87.

¹⁰ ICC-02/05-03/09-451-Anx, para. 8; ICC-01/05-01/08-813-Red, para. 87.

¹¹ ICC-02/05-03/09-451-Anx, para. 9; ICC-02/11-01/11-49-Anx, page 4; ICC-01/04-01/06-1372, para. 12; ICC-01/05-01/08-813-Red, para. 87.

the name and particulars of the person(s) to whom the information was communicated; (ii) the name of the person who communicated the information; (iii) the date at which the information was communicated; and (iv) the location where the information was communicated.¹²

11. The party or participant shall keep a record of all the members of the party's or participant's team having access to this material and the period during which they had such access.¹³ Any member of the legal teams of the parties and participants shall, upon separation from those teams, return all confidential material in their possession to the relevant person within the team.¹⁴ The head of such legal teams shall take reasonable measures to ensure that such confidential material is returned.

IV. Inadvertent Disclosure

12. In the event that a disclosing party or participant discovers that it has disclosed material that should not have been disclosed or should have been disclosed in redacted form, it shall immediately inform the receiving party or participant.¹⁵ The Victims and Witnesses Unit ('VWU') shall also be informed if the witness concerned is in the ICCPP or is otherwise provided with any form of protective measures.
13. In the event that the receiving party or participant discovers that it has received material that it believes should not have been disclosed or should have been disclosed in redacted form, the receiving party or participant shall bring that fact immediately upon discovery to the attention of the disclosing party or participant. Pending confirmation by the disclosing party or participant that the material should not have been disclosed or should have been disclosed in redacted form, the member of the team having received the said material shall act in good faith and refrain from sharing the material in any manner, including with the accused and, to the extent possible, with other members of the team.

¹² See ICC-02/05-03/09-451-Anx, para. 9; ICC-01/09-01/11-449-Anx, para. 22.

¹³ ICC-02/05-03/09-451-Anx, para. 10.

¹⁴ ICC-02/05-03/09-451-Anx, para. 10; ICC-02/11-01/11-49-Anx, page 4; ICC-01/04-01/06-1372, para. 13.

¹⁵ Trial Chamber V, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Protocol establishing a redaction regime in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-458-AnxA-Corr, 5 October 2012, para. 21.

14. As soon as the disclosing party or participant informs the receiving party or participant or confirms that the material should not have been disclosed or should have been disclosed in redacted form, the receiving party or participant shall return to the disclosing party the material as well as any copies that it may have made. The receiving party or participant shall delete any electronic copies in its possession.¹⁶
15. Should a dispute arise as to whether or not the material should have been disclosed or should have been disclosed in redacted form, the parties and participants shall first seek to resolve the dispute on between themselves. If they are unable to do so, the matter may be brought to the attention of the Chamber by way of written application.¹⁷
16. Moreover, the receiving party or participant will instruct any individuals who have read or have had access to the inadvertently disclosed material to refrain from using the material any further and will ensure that all remaining copies of the inadvertently disclosed material are returned to the disclosing party and any electronic copies destroyed.¹⁸

V. Disclosure of the Identity of Witnesses of Other Parties and Participants In the Course of Investigations

17. This section of the Protocol applies to witnesses whose identity or relationship with the Court has not yet been made public by a party, participant or by the Chamber or who have other protective measures known to the investigating party or participant.¹⁹
18. The VWU remains available to provide training on best practices and advice to the Court staff, parties and participants who are in direct contact with potential witnesses and with victims.²⁰
19. It is essential that the investigating party or participant avoid whenever possible the security risk of disclosing to a member of the public the identity of witnesses.²¹ The provisions of this Protocol concern situations

¹⁶ ICC-01/09-01/11-458-AnxA-Corr, para. 23.

¹⁷ ICC-01/09-01/11-458-AnxA-Corr, para. 24.

¹⁸ ICC-01/09-01/11-458-AnxA-Corr, para. 25.

¹⁹ ICC-02/05-03/09-451-Anx, para. 11.

²⁰ ICC-02/05-03/09-451-Anx, para. 12; ICC-01/09-01/11-449-Anx1, para. 17.

²¹ ICC-02/11-01/11-49-Anx, page 1.

where such disclosure is considered directly and specifically necessary for the purpose of investigation and/or preparation of its case.

Use of Names or Other Identifying Information

20. The investigating party or participant shall use the names of witnesses of the opposing party or a participant only when directly and specifically necessary for the purposes of its investigation or and/or preparation of its case.²²
21. If the investigating party or participant finds it directly and specifically necessary for the preparation and presentation of its case to disclose to a member of the public the name or identifying information of a witness, the party or participant shall under no circumstances reveal (i) that the person is involved, directly or indirectly, with the activities of the Court; or (ii) the nature of such involvement.²³ In case of doubt as to the necessity of the disclosure, the Chamber shall decide.
22. Should the investigating party or participant need to disclose the identity of a witness who is in the ICCPP or who has otherwise been relocated with the assistance of the Court, during the course of specific investigations related to that witness, the investigating party or participant shall liaise with the VWU prior to the mission in which such disclosure may take place and shall communicate the details of the place, time and, to the extent possible, the person(s) that the party or participant intends to contact and to whom it intends to disclose the identity in question. Additionally, the way disclosure will take place will be discussed with the VWU, which shall provide the investigating party or participant with its best practices and advice in relation to the specific information communicated by that party or participant.
23. Should the investigating party or participant need to disclose the identity of a witness who is otherwise protected by the VWU, the investigating party or participant shall inform the VWU as soon as possible.
24. The investigating party or participant shall not make inquiries relating to the current location of protected witnesses or other persons who have

²² ICC-02/05-03/09-451-Anx, para. 13.

²³ ICC-02/05-03/09-451-Anx, para. 14; ICC-02/11-01/11-49-Anx, page 1; ICC-01/05-01/08-813-Red, para. 84.

been admitted to the ICCPP, who have been assisted by the Court to move away from their initial place of residence, or whose location has been protected by the Chamber. Should the location of such protected witnesses or persons become apparent to the investigating party or participant, it shall inform the VWU as soon as possible.²⁴

Investigation of Information of Sexual Violence

25. Where a witness has stated that she or he has suffered sexual and/or gender based crimes and it is apparent that the witness has not discussed the violence with members of his or her family, the investigating party or participant must exercise real caution in investigating the allegations to protect the privacy, dignity and well-being of the witness. It shall not reveal this information to these family members or to persons who will communicate the information to family members and any inquiries it undertakes must be done so as to ensure the confidentiality of the information. Where there are no suitable alternative investigative avenues available, the investigating party or participant may communicate the information that the witness suffered sexual or gender based crimes to those individuals that the witness has stated she or he has informed or has confirmed are aware of the sexual and gender based crimes suffered, provided that in doing so the investigating party or participant does not reveal that she or he is a Court witness.

Breaches of confidentiality

26. If the investigating party or participant finds that the recipient of the information knows or understands that a witness, including a witness admitted in the ICCPP, is involved with the Court, it must expressly inform the recipient of the confidential nature of this information and instruct him or her not to disclose this information any further. The investigating party or participant must also inform the VWU of such an occurrence as soon as possible.
27. All investigating parties and participants shall bring to the attention of the VWU any reasonable suspicion that a witness, members of his or her

²⁴ ICC-02/05-03/09-451-Anx, para. 18; ICC-02/11-01/11-49-Anx, page 2; Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Annex 1 to Victims and Witnesses' Unit Observations on the "Protocol on investigations in relation to witnesses benefiting from protective measures", 10 March 2010, ICC-01/04-01/07-1956-Anx1, para. (e).

family, or others at risk may have been placed at risk for any reason (for example, if his or her participation as a witness is known, or his/ her protected location has become known) as soon as possible.²⁵

28. Likewise, if a party or participant has revealed confidential information, or has become aware of any other breach of the confidentiality of information under the present Protocol, or realises that a third party has become aware of confidential information, it shall inform the recipient of the information about the confidential nature of such information and instruct him not to disclose it any further.²⁶ In addition, it shall immediately inform the VWU,²⁷ who will keep confidential any information that could impact ongoing investigations into such a breach.

Prior consent to disclosure secured from witnesses by the calling party or participant

29. The parties or participants carry the responsibility of ensuring that witnesses they intend to call provide, whenever possible, their informed consent in writing to their involvement with the Court. This consent should be provided before the provision of any witness statement. The parties and participants bear a higher responsibility in this regard when their activities may involve vulnerable witnesses.
30. If the party or participant collects visual and/or non-textual material from the witness, it shall clarify explicitly how these materials may be disclosed.

VI. Regulation of Contacts Between a Party or Participant and a Witness of the Opposing Party or participants

31. This section of the Protocol governs the conditions under which the investigating party or participant is authorised to contact witnesses of the opposing party or a participant.
32. This section applies only to a 'witness' as defined under paragraph 1(f) of the Protocol.

²⁵ ICC-01/04-01/07-1956-Anx1, para. (f); ICC-02/05-03/09-451-Anx, para. 18; ICC-02/11-01/11-49-Anx, page 2.

²⁶ ICC-02/05-03/09-451-Anx, para. 19.

²⁷ ICC-01/09-01/11-449-Anx, para. 35.

Consent

33. A party or participant who seeks to interview a witness of the opposing party or of a participant can only do so if the witness consents to the interview.²⁸

Notification to the Opposing Party or Participant

34. The party or participant seeking to contact a witness of the opposing party or participant will provide the latter with notice of its intent to do so. Such a procedure will allow the opposing party or participant to ask the witness whether he/she agrees to be contacted or interviewed. After being notified, the party or participant calling the witness shall seek the consent of the witness within five business days of receiving notification.²⁹
35. The decision whether to be interviewed is up to the witness. The calling party or participant shall not attempt to influence the witness's decision whether to agree to be interviewed by the other party or participant.³⁰

Contact with Individuals Participating in the ICCPP and those subject to an assisted move

36. When the party or participant wishing to interview a witness is aware that the witness is a participant in the ICCPP, or has been otherwise relocated with the assistance of the Court, the party or participant shall, in addition to notifying the calling party or participant, also inform the VWU.³¹
37. All contact with individuals who are part of the ICCPP shall be facilitated exclusively by the VWU.³²

Objections to the Interview

38. If the party or participant who intends to call or rely upon a witness objects to the interview of that witness, it shall inform the investigating

²⁸ ICC-02/05-03/09-451-Anx, para. 21; ICC-01/04-01/06-1372, para. 11.

²⁹ ICC-01/09-0/11-449-Anx, para. 7; ICC-02/05-03/09-451-Anx, para. 22.

³⁰ ICC-01/09-0/11-449-Anx, para. 7.

³¹ ICC-01/09-01/11-449-Anx, para. 14; ICC-02/05-03/09-451-Anx, para. 30.

³² ICC-01/09-02/11-449-Anx, para. 15; ICC-02/05-03/09-451-Anx, para. 30.

party or participant. If they cannot reach an agreement, despite genuine efforts to do so, they may raise the matter with the Chamber.³³

39. Without prejudice to Articles 56 and 57(3)(b) of the Statute and Rule 114 of the Rules, the party or participant seeking the interview shall not proceed with said interview until the Chamber rules on the matter.³⁴

Presence during the Interview

40. The witness is entitled to have a representative attend the interview. This is the choice of the witness; the calling party or participant shall not influence the witness's decision on whether to have a representative present during the interview.
41. In addition, independent of the wishes of the witness, it is the responsibility of the calling party or participant to ensure that, if the witness is particularly vulnerable or otherwise in need of assistance during the interview, the appropriate assistance is provided and that, where necessary, it contacts the VWU well in advance of the scheduled interview in order to arrange for an assessment of the need for assistance by a VWU representative during the interview.³⁵

Arranging the interview

42. Once the witness has given his or her consent to be interviewed, the party or participant calling the witness or relying on his or her statement shall inform the investigating party or participant and contact shall be facilitated as appropriate.³⁶ If the calling party or participant attends the interview, it shall bear its own travel and other costs associated with the interview.³⁷
43. In principle, the parties and participants shall make all the necessary logistical arrangements in accordance with best practices.³⁸ However,

³³ ICC-01/09-01/11-449-Anx, para. 8; ICC-02/05-03/09-451-Anx, para. 23.

³⁴ ICC-01/09-01/11-449-Anx, para. 9; ICC-02/05-03/09-451-Anx, para. 24.

³⁵ ICC-01/09-01/11-449-Anx, para. 13; ICC-02/05-03/09-451-Anx, para. 29.

³⁶ ICC-01/09-01/11-449-Anx, para. 7; ICC-02/05-03/09-451-Anx, para. 25.

³⁷ See Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Prosecution Motion on Procedure for Contacting Defence Witnesses and to Compel Disclosure, 15 October 2012, ICC-01/05-01/08-2293, para. 31.

³⁸ ICC-01/09-01/11-449-Anx, para. 12.

should there be any remaining security concerns, the calling party or participant shall inform the VWU for the latter to assess the situation and, if necessary, take relevant steps in order to assist the parties and participants in organising the meeting in a safe manner.³⁹

44. In the event that the investigating party or participant wishes to meet a witness who is a participant in the ICCPP, the VWU will inform the investigating party or participant of the location at which the meeting will take place, and the VWU will undertake all necessary logistical arrangements for the witness to be present in the location specified on the date previously agreed with the investigating party or participant.⁴⁰

Recording of the Interview

45. A video or audio record of the entire interview will be provided to the party or participant calling the witness or relying on his or her statement as soon as practicable after the conclusion of the interview.⁴¹

VII. Derogation

46. Any deviation from this Protocol requires the prior authorisation of the Chamber.⁴²

³⁹ ICC-01/09-01/11-449-Anx, para. 12.

⁴⁰ ICC-01/09-01/11-449-Anx, para. 15; ICC-02/05-03/09-451-Anx, para. 30.

⁴¹ ICC-02/05-03/09-451-Anx, para. 31.

⁴² ICC-02/05-03/09-451-Anx, para. 32.